

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

ROY EUGENE WATSON,

Debtor.

Case No. **04-62118-13**

O R D E R

At Butte in said District this 22nd day of March, 2006.

In this Chapter 13 bankruptcy, after due notice, a hearing was held March 21, 2006, in Billings on the Trustee's Motion to Convert filed February 21, 2006, together with Debtor's opposition thereto. The Chapter 13 Trustee, Robert G. Drummond, appeared at the hearing in support of his Motion. Debtor was represented at the hearing by his counsel of record, Martha Carlson McCormack. Additionally, Debtor and Roger D. Johnston of Billings Real Estate Professionals testified and the Trustee's Exhibits A through I were admitted into evidence without objection.

The Trustee seeks conversion of this case to Chapter 7 of the Bankruptcy Code arguing that Debtor is in default under the terms of his Plan; that Debtor has failed to utilize his bank account for all of his receipts and expenses related to his business, despite a directive by this Court to do so; and that Debtor is proceeding in bad faith. The facts associated with case are straight forward and are not in dispute.

This is the third bankruptcy case filed by Debtor in this District. Debtor filed a voluntary Chapter 13 bankruptcy petition on December 27, 2001, commencing Case Number 01-13817.

Debtor's first bankruptcy was dismissed upon request of Debtor on July 24, 2002. Debtor filed his second bankruptcy petition under Chapter 13 of the Bankruptcy Code on July 31, 2002, commencing Case Number 02-12272. Debtor's second bankruptcy was dismissed upon request of the Chapter 13 Trustee on February 5, 2003, for Debtor's failure to make all the payments required under the terms of his proposed Chapter 13 plan. Debtor subsequently commenced this case on July 8, 2004.

The Trustee previously sought the conversion of this bankruptcy case to Chapter 7 on December 3, 2004, arguing that Debtor was not in compliance with Federal law as required for confirmation by 11 U.S.C. § 1325(a)(2), in that Debtor had not filed all his tax returns due through the year 2003. After several continuances of the hearing on the Trustee's December 3, 2004, motion to convert, Debtor finally filed his tax returns and the Trustee withdrew his request for conversion at a hearing held May 17, 2005. Debtor's Third Amended Chapter 13 plan was also confirmed by Order entered May 17, 2005.

The above was followed by a Motion of Trustee to Convert filed June 28, 2005, which Motion was withdrawn July 5, 2005; a Motion for Trustee to Dismiss filed October 21, 2005¹; and the Trustee's instant Motion to Convert filed February 21, 2006. In addition to the foregoing, the Trustee also filed a Motion for Order Compelling Accounting and Turnover of Bank Statements on May 16, 2005, wherein the Trustee requested an Order compelling:

1. Turnover of monthly business reports in a form prescribed by the Trustee.

¹ A hearing on the Trustee's Motion to Dismiss was scheduled for November 22, 2005, but Debtor improperly scheduled it for hearing by referencing the hearing site with the docket language used for § 341 meetings, so the hearing never appeared on the Court's hearing calendar and appears to have been terminated by the Court without cause. Thus, the Trustee's Motion to Dismiss is theoretically still pending.

2. Debtor to deposit all business income and pay all business expenditures through a bank account and provide the Trustee with copies of monthly bank statements and copies of checks.
3. Debtor to deposit all income from all sources related to all business ventures into the bank account or accounts and that the Debtor be ordered to pay all business expenses for all business ventures from that bank account or accounts.
4. Debtor to provide the Trustee with personal bank account statements.

The Trustee's Motion for Order Compelling Accounting and Turnover of Bank Statements was granted by the Court in whole by Order entered May 17, 2005.

Debtor testified at the hearing that he has not complied with the Court's Order Compelling Accounting and Turnover of Bank Statements. First, Debtor has not turned over all monthly business reports to the Trustee. Debtor conceded at the hearing that he has not provided the Trustee with business reports for January and February of 2006. Second, Debtor has not deposited all business income and paid all business expenditures through a bank account. For instance, Debtor reported on Exhibit B that in November of 2005, Debtor had gross income of \$6,492.50 from the Hardin Trailer Court, but only deposited \$2,712.00 of that amount in his bank account. Similarly, in May of 2005, Debtor had income of \$7,282.50 from the Hardin Trailer Court along with other income of \$1,075.00, but only \$2,142.00 of the above amount was deposited in Debtor's checking account in May of 2005. The Court used May and November of 2005 as examples because Debtor has only provided the Trustee with bank statements for a select few months.

In addition, Debtor agreed that he has not provided the Trustee with either receipts or

copies of cancelled checks supporting Debtor's monthly expense numbers. Even though Debtor testified that he has receipts for all his cash purchases, he failed to produce even one receipt at the hearing.

Finally, Debtor wholly failed to provide any accounting of the income and expenses associated with Debtor's horse business. According to Debtor, he has probably sold 20 horses since this case was filed. Debtor has not provided the Court or the Trustee with an accurate count of horses sold. Moreover, Debtor has not provided the Court or the Trustee with an accounting of the proceeds from the sale of those 20 or so horses. All Debtor could offer at the hearing was that he thought the sales proceeds may have been applied to the secured obligation owing to Free Rivers Ranch.

In addition to the foregoing, Debtor's Chapter 13 Plan contemplates, in addition to the sale of Debtor's horse herd, the sale of real property. Debtor has entered into a Standard Listing Contract with Billings Real Estate Professionals, Exhibit I, wherein Debtor signed the Agreement both as the Seller and as the Listing Salesperson.² Debtor has had the Hardin Trailer Court listed for sale since October 29, 2005, at a price of \$475,000. Debtor testified that he arrived at a sales price of \$475,000 by applying a 10 or 12 percent capitalization rate to the Hardin Trailer Court's net revenues.³ The foregoing Trailer Court was valued at under \$300,000 by Debtor in his Schedules and, according to Debtor's unsubstantiated hearsay testimony, a current market analysis of the Trailer Court sets the value of the Trailer Court at \$395,000.

² Debtor is an independent contractor with Billings Real Estate Professionals.

³ Applying the more conservative capitalization rate of 10 percent to the sales price of \$475,000 would imply that the Hardin Trailer Court is netting revenues of \$47,500 per year or \$3,958.34 per month

Debtor also testified that he has entered into a special arrangement with Billings Real Estate Professionals wherein Debtor's commission upon the sale of the Hardin Trailer Court would be something less than his standard 60 percent, although Debtor could not recall the exact terms of the agreement. Contrary to Debtor's testimony, Roger Johnston, the Broker/Owner of Billing Real Estate Professionals, testified that Debtor would receive his standard rate of 60% on any commission payable to Billings Real Estate Professionals upon the sale of the Hardin Trailer Court.

Debtor also agreed that he is delinquent in his plan payments. After conceding all the foregoing shortcomings, Debtor testified that he is now determined to mend his ways by putting all his cash in his checking account and paying all expenses with checks rather than cash. Debtor also testified that he hopes to catch up on his delinquent plan payments by the end of the month.

Whether a Chapter 13 case should be converted to another Chapter of the Bankruptcy Code is governed by 11 U.S.C. § 1307(b). Section 1307(b) provides that upon "request of a party in interest . . . and after notice and a hearing, the court may convert a case . . . or may dismiss a case . . . for cause[.]" Whether a particular case is converted or dismissed depends on whichever is in the best interest of creditors and the estate. 11 U.S.C. § 1307(b):


Based upon the undisputed evidence admitted at hearing and the record in this case, the Court finds that overwhelming cause exists to grant the Trustee's motion to convert this case to Chapter 7 of the Bankruptcy Code. The Court further finds that conversion to Chapter 7 is in the best interest of creditors and the estate. The Court deems it unnecessary to address each and every allegation set forth in the Trustee's Motion because of Debtor's breach of his fiduciary duties; and Debtor's unaccounted use of estate property, particularly cash.

Debtors, as bankruptcy trustees, are a fiduciary of each creditor of the estate. *In re Cochise College Park, Inc.* 703 F.2d 1339, 1357 (9th Cir. 1983). As fiduciaries, debtors have an obligation to conserve the assets of the estate and to maximize distribution to creditors. *In re Rigden*, 795 F.3d 727, 730 (9th Cir. 1986); *Matter of Accomazzo*, 226 B.R. 426, 429 (D. Ariz. 1998); *In re Benny*, 29 Bankr. 754, 760 (N.D.Cal.1983), citing 2A *Collier on Bankruptcy* ¶ 47.04 (14th ed. 1978); see also 7 *Collier on Bankruptcy* ¶ 1118.09 (15th ed. 1996).

In the instant case the record shows that Debtor has failed to comply with this Court's Order granting the Trustee's Motion for Order Compelling Accounting and Turnover of Bank Statements. Moreover, Debtor has failed to comply with his fiduciary obligation to maximize distribution to creditors and to preserve the property of the estate. Debtor's failure to account for the proceeds from the sale of approximately 20 horses coupled with Debtor's complete failure to account for his business income and expenses constitutes sufficient cause to convert this case to Chapter 7. Accordingly,

IT IS ORDERED that the Trustee's Motion to Convert filed February 21, 2006, is granted; and this case is converted to Chapter 7 of the Bankruptcy Code.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana